



INTERIOR BOARD OF INDIAN APPEALS

Estate of Harvey Fred Shade, Sr.

61 IBIA 51 (06/30/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF HARVEY FRED	)	Order Referring Inventory Dispute to
SHADE, SR.	)	the Bureau of Indian Affairs and
	)	Dismissing Appeal in Remaining Part
	)	
	)	Docket No. IBIA 13-050
	)	
	)	June 30, 2015

Steven C. Shade (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered on January 8, 2013, by Administrative Law Judge (ALJ) Earl J. Waits in the estate of Appellant’s father Harvey Fred Shade, Sr. (Decedent).<sup>1</sup> Appellant contends that the ALJ erred by failing to refer to the Bureau of Indian Affairs (BIA) for resolution Appellant’s allegation that Decedent had made an enforceable promise to convey a 1.5-acre portion of Decedent’s allotment to Appellant, which Appellant contends BIA should retroactively approve and which would affect the inventory of Decedent’s estate. We agree that while seeking rehearing, Appellant squarely raised an inventory dispute that the ALJ should have referred to BIA, pursuant to 43 C.F.R. § 30.128.<sup>2</sup> But, we need not set aside the ALJ’s Order Denying Rehearing because the inventory dispute presents no cause to revisit the underlying probate decision in substance, and the Board can directly refer the inventory dispute to BIA. We dismiss the appeal in remaining part because Appellant’s additional arguments are either rendered moot by our referral or are outside the scope of this appeal.

## Background

Decedent died on March 28, 2006. At the time of his death, Decedent owned a 5.5-acre Native Allotment (Allotment) in restricted fee. Inventory of Restricted Lands, Apr. 10, 2008, at 1 (Administrative Record (AR) Tab 3). Decedent was survived by his second wife, Alma Elizabeth Shade (Alma), five children from his first marriage (including

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<sup>1</sup> Decedent was an Alaska Native. His probate is assigned No. P000043035IP in the Department of the Interior’s (Department) probate tracking system, ProTrac.

<sup>2</sup> Section 30.128 is a provision in the Department’s probate regulations, which requires that inventory disputes that arise during probate be referred to BIA for resolution.

Appellant), three step-children (Alma's children), and numerous grandchildren. Data for Heirship Finding, Apr. 10, 2008, at 1-2 (AR Tab 2).

Decedent left a will. Will, Aug. 17, 2004, at 2 (AR Tab 5). In the original probate decision, the ALJ rejected challenges to the will by Appellant and several other of Decedent's children, and approved the will. Under the terms of the will, Alma was the sole beneficiary of Decedent's trust and restricted property, including the Allotment.<sup>3</sup> Decision, June 7, 2012, at 6 (AR Tab 1). In his decision, the ALJ noted that he had referred to BIA an inventory dispute that had yet to be resolved, which involved an alleged gift deed executed by Decedent transferring a portion of the Allotment to Douglas Shade (Douglas) (another son of Decedent and a brother to Appellant).<sup>4</sup> *Id.* at 1-2. In summarizing evidence received in the case, the ALJ mentioned, in the context of the will challenges, a letter from Appellant describing "several alleged oral promises made by Decedent to give various properties" to Appellant and Douglas. *Id.* at 2. The letter stated that Decedent had intended to give Appellant a portion of the Allotment on which Appellant had built a house and other improvements. *See id.*

Following the ALJ's decision approving Decedent's will, Appellant filed a petition for rehearing *pro se*, which he later supplemented with a petition filed through counsel.<sup>5</sup> *See* Petition for Rehearing, June 25, 2012 (AR Tab 21); Supplemental Petition for Rehearing, August 7, 2012 (AR Tab 21). In his first petition, Appellant argued that the inventory attached to the Decision incorrectly included certain improvements Appellant had placed on the Allotment. Petition for Rehearing at 1-2. The supplemental petition alleged that Decedent had promised to gift deed a portion of the Allotment to Appellant, that Appellant had constructed improvements on the property in detrimental reliance on Decedent's promise, and that the promise had thus become enforceable and should be retroactively approved by BIA. Supplemental Petition at 3-4, 6. Appellant asked that the ALJ refer "his alleged agreement with Decedent" to BIA for resolution under 43 C.F.R. § 30.128. *Id.* at 2.

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<sup>3</sup> Alma, who has since died, was non-Indian, and thus the property passed to her in unrestricted fee.

<sup>4</sup> The inventory dispute raised by Douglas involves a different portion of the Allotment and is entirely separate from the one raised by Appellant.

<sup>5</sup> Douglas also filed a petition for rehearing, reiterating an argument he had previously raised that it was Decedent's "intention" to leave the Allotment to his children. Douglas Petition for Rehearing, July 4, 2012, at 1 (AR Tab 21). Douglas did not appeal the ALJ's Order Denying Rehearing.

The ALJ denied the petition for rehearing, explaining that BIA's inventory did not include improvements, and thus Appellant's allegation that the inventory was erroneous was misplaced. Order Denying Rehearing at 2 (AR Tab 21). The ALJ acknowledged that in Appellant's supplemental petition for rehearing, Appellant had asked the ALJ to refer to BIA the question of an alleged oral contract between Decedent and Appellant to gift deed a portion of the Allotment to Appellant. *Id.* But the ALJ characterized the supplemental petition as raising a new issue—whether Decedent had entered into an enforceable agreement with Appellant—and concluded that because no new evidence was offered by Appellant in seeking rehearing, his petition offered nothing that had not already been considered in the Decision. *Id.* The ALJ denied rehearing without referring the matter to BIA.

Appellant appealed the Order Denying Rehearing to the Board and filed an opening brief. No other briefs were filed in this case.

### Discussion

Appellant contends that the ALJ erred in not referring Appellant's inventory dispute to BIA pursuant to 43 C.F.R. § 30.128. Opening Brief (Br.), May 21, 2013, at 20. We agree. Under the Department's probate regulations, a probate judge must refer inventory disputes that arise during a probate proceeding to BIA for a decision. *Estate of Urialah "Red" Alexander*, 59 IBIA 159, 162 (2014); *see also* 43 C.F.R. § 30.128(b) ("When an error in the estate inventory is alleged, the OHA deciding official will refer the matter to BIA for resolution under 25 C.F.R. parts 150, 151, or 152 and the appeal procedures at 25 C.F.R. part 2.").

In his supplemental petition for rehearing, Appellant plainly argued that he had an "alleged agreement with Decedent" and that Decedent had made a "promise to gift deed" a portion of the Allotment to Appellant, which "should be retroactively approved by BIA." Supplemental Petition at 2-3. The matter of whether or not Appellant's allegations were accompanied by evidence to support his claim is for BIA to decide on referral, not grounds for the ALJ to decline to make the referral. It is not the role of the probate judge, or the Board, to screen inventory disputes for factual or legal sufficiency. *See Estate of Harrison Yazzie*, 51 IBIA 307, 310 (2010) (concluding that the probate judge erred in dismissing a gift deed claim without referring it to BIA, and that whether the evidence was insufficient to permit BIA to approve an alleged conveyance was an issue that went to the merits of the claim, over which the probate judge lacked jurisdiction).

We need not set aside the Order Denying Rehearing to comply with the regulation governing resolution of inventory disputes, however, because § 30.128 applies to the Board as well in this appeal. *See Estate of Michael Lawrence Study*, 51 IBIA 227, 229 (2010) (referring inventory dispute to BIA); *Estate of James Jones, Sr.*, 51 IBIA 132, 135 (2010)

(§ 30.128 applies to the Board). Thus, we refer the dispute to BIA for resolution through issuance of an administrative decision that will be subject to the appeal provisions in BIA's regulations. *See* 25 C.F.R. Part 2; *see also* 43 C.F.R. §§ 4.330 – 4.331 (administrative appeal rights to the Board).

As provided in 43 C.F.R. § 30.128(b)(2)(ii), the probate decision is subject to modification once the inventory dispute has been resolved. Because the Allotment will pass to Alma's estate in unrestricted fee, BIA shall stay distribution of the Allotment (or affected portion)<sup>6</sup> from Decedent's estate, pending final resolution of Appellant's claim and a determination whether the portion of the Allotment subject to that claim should be removed from the estate inventory.

We dismiss the appeal in remaining part because Appellant's allegation that he was denied due process when the ALJ failed to refer the inventory dispute to BIA is rendered moot by our referral, and his additional arguments pertain to the merits of his inventory claim, which are outside the scope of this probate appeal.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board refers to the BIA Alaska Regional Director (Regional Director) for resolution, through issuance of a decision pursuant to 25 C.F.R. § 2.7, Appellant's allegations contained in his supplemental petition for rehearing and his brief on appeal, that Decedent made a promise to convey a portion of the Allotment to Appellant, and that the promise is enforceable and should be retroactively approved by BIA.<sup>7</sup> We dismiss the appeal in remaining part.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge

<sup>6</sup> In the event it is possible for BIA to distribute the unaffected portion of the Allotment, it may do so.

<sup>7</sup> We leave it to the Regional Director to decide whether the initial BIA decision should be made by a subordinate official, with a right of appeal to the Regional Director, *see* 25 C.F.R. § 2.4(a), or by the Regional Director.